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NEGOTIATION IMPASSES: THE ROAD TO RESOLUTION

BEVERLY K. SCHAFFER*

IF THE PARTIES to collective bargaining reach an impasse, how is the dispute resolved? In both the private sector and the federal sector, mediators provide valuable assistance to the parties, frequently enabling them to resolve their dispute. In the private sector, however, work stoppages and the threat of work stoppages provide the real incentive for the parties to reach an agreement. A statute prohibits such work stoppages in the federal sector.¹ Federal employees who participate in a strike, assert the right to strike, or maintain membership in an organization which they know asserts the right to strike against the federal government, violate the law

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¹ 5 U.S.C. § 7311 (1966) provides:

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he

...

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

5 U.S.C. § 7103(a)(2)(B)(v)(1978) excludes "any person who participates in a strike in violation of" 5 U.S.C. § 7311 (1966) from the definition of an "employee."

and may be denied federal employment, fined up to \$1,000 and/or imprisoned for up to one year and a day.² Any labor organization which calls or participates in a work stoppage, or condones such activity by failing to take action to prevent or end it engages in an unfair labor practice³ which may result in the labor organization's decertification as an exclusive bargaining representative or result in other appropriate disciplinary actions.⁴ How then are impasses in collective negotiations in the federal sector resolved? What procedures and techniques are available and how well do they operate? This article attempts to answer these questions for that portion of the federal service covered by Title VII of the Civil Service Reform Act of 1978.⁵

Title VII, the Federal Service Labor-Management Relations

² 5 U.S.C. § 7311 (1966); 18 U.S.C. § 1918 (1966) (establishes the criminal penalties for violations of 5 U.S.C. § 7311 (1966)).

³ 5 C.F.R. § 731.201 (1975) permits the Office of Personnel Management (OPM) to deny an applicant examination, deny an eligible appointment, and instruct an agency to remove an appointee when the OPM determines that this action will promote the efficiency of the federal service. Such determination may be made on the basis of "(a)ny statutory disqualification which makes the individual unfit for the service." 5 C.F.R. § 731.202(b)(8) (1975). Thus, OPM could base a decision to remove an employee on the finding of a violation of 5 U.S.C. § 7311 (1966). When a person is thus disqualified for federal employment, "OPM in its discretion, may deny that person examination for and appointment to a competitive position for a period of not more than 3 years from the date of determination of disqualification. On expiration of the period of debarment, the person who has been debarred may not be appointed to any position in the competitive service until his fitness for appointment has been redetermined by OPM." 5 C.F.R. § 731.303 (1968) as amended. Any employee whom OPM debars from employment or his agency may appeal the removal to the Merit Systems Protection Board. 5 C.F.R. § 731.401 (1974) as amended.

⁴ 5 U.S.C. § 7116(b)(7)(A), (B)(1978).

⁵ 5 U.S.C. § 7120(f)(1978). Exercising its authority under this provision, the Federal Labor Relations Authority revoked the exclusive recognition status of the Professional Air Traffic Controllers in a decision issued on October 22, 1981. The Authority found that PATCO willfully and intentionally called, participated in and condoned the strike which began at the start of the day shift on August 3, 1981. Accordingly, FLRA revoked the organization's exclusive recognition status.

Organizations which participate in the conduct of a strike against the federal government or impose a duty or obligation to conduct, assist, or participate in such a strike fall outside of the definition of a "labor organization" under 5 U.S.C. § 7103(a)(4) (1978) and, therefore, enjoy no rights accorded to labor organizations by Title VII of the Civil Service Reform Act. 5 U.S.C. § 7101-7135 (1978).

⁶ 5 U.S.C. § 7101-7135 (1978). Coverage includes the Federal Aviation Administration and many of its employees.

Statute (the Statute)⁶ provides several procedures for the resolution of negotiation impasses: (1) voluntary arrangements, including mediation; (2) binding arbitration pursuant to a procedure agreed upon by the parties; and (3) assistance and arbitration by the Federal Service Impasses Panel (the Panel).⁷ All of these procedures will be discussed but, since Title VII conditions the use of an agreed upon arbitration procedure on approval by the Panel, such procedures will be discussed in the section outlining the Panel's operations.

I. VOLUNTARY ARRANGEMENTS INCLUDING MEDIATION

The Statute recognizes that parties may utilize voluntary arrangements, including mediation, to resolve an impasse.⁸ While it permits mediation by any third party, it directs the Federal Mediation and Conciliation Service (FMCS) to provide "services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses."⁹ The FMCS is authorized to determine under what circumstances and in what manner it will provide such assistance.¹⁰ Current FMCS rules and regulations require the party initiating collective bargaining to file a notice with the Service at least 30 days prior to the expiration or modification date of an existing agreement.¹¹ Parties entering negotiations for an initial agreement must file such notice within 30 days after the com-

⁶ *Id.*

⁷ 5 U.S.C. § 7119 (1978). The composition and function of the Federal Service Impasses Panel are discussed below. The Federal Service Labor-Management Relations Statute also permits the use of informational picketing which does not interfere with an agency's operations. 5 U.S.C. § 7116(b) (1978).

⁸ 5 U.S.C. § 7119(b) (1978) provides:

If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service (FMCS) or any other third-party mediation, fail to resolve a negotiation impasse . . .

(1) either party may request the Federal Service Impasses Panel to consider the matter, or
(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

⁹ 5 U.S.C. § 7119(c)(1) (1978).

¹⁰ *Id.*

¹¹ 29 C.F.R. § 1425.2 (1980).

mencement of negotiations.¹² Parties entering negotiations for mid-term negotiations or impact bargaining may, but need not, submit a notice.¹³ It is through these notices and requests by the parties that FMCS becomes involved in federal sector collective bargaining, standing ready to assist the parties in resolving their dispute. The service assisted in the resolution of many negotiation impasses.

In addition to mediation, the parties may employ other voluntary arrangements to resolve an impasse. These include factfinding with or without recommendations, consultation, and other arrangements. In one case, for example, the parties agreed to a scheme whereby FMCS would make recommendations based on the last-best-offer of the parties.¹⁴ Bargaining then resumed and the parties settled 216 of 225 unsettled issues on their own, leaving only nine for FMCS recommendations.¹⁵

II. ASSISTANCE AND ARBITRATION BY THE FEDERAL SERVICE IMPASSES PANEL

A. *The Structure of the Panel*

Executive Order 11491 originally established the Federal Service Impasses Panel to assist the parties in resolving negotiation impasses.¹⁶ It provided for a Panel consisting of at

¹² *Id.*

¹³ *Id.*

¹⁴ Department of the Treasury, Internal Revenue Service and National Treasury Employees Union, 80 Federal Reserve Impasses Panel 68 (December 24, 1980), Panel Release No. 177 (January 7, 1981).

¹⁵ GOV'T. EMPL. REL. REP. (BNA) 938:7 (November 16, 1981). Following a request for the Panel's consideration of the nine issues still at impasse, the parties resumed negotiations and resolved all but one issue. The Panel subsequently resolved the remaining issue on the basis of factfinding with recommendations by a Panel designee followed by a Panel decision and order.

¹⁶ Exec. Order No. 11491, §§ 5, 17 WEEKLY COMP. PRES. DOC. 1334 (Oct. 29, 1969). In 1969 President Nixon appointed a Study Committee to evaluate the seven years of experience under the Presidential policies governing relationships between labor organizations and agencies in the executive branch - policies which Executive Order 10988 established in January 1962. The Committee found the then current policies lacking any express procedures for use in the event of impasses in collective bargaining. To fill this void, the Committee recommended the creation of a Federal Service Impasses Panel to assist in resolving negotiation impasses. It called for the use of

least three members, appointed by the President, one of whom was to be designated as Chairman.¹⁷ The order, however, did not specify the terms of office. President Nixon appointed seven persons in August of 1970, and in that year the Panel began its operations.

Title VII also provides for a Panel, consisting of a Chairman and at least six other members, to assist in the resolution of negotiation impasses.¹⁸ The President appoints members from among individuals who are familiar with Government operations and knowledgeable in labor-management relations solely on the basis of fitness to perform the duties and functions involved.¹⁹ While appointments are for overlapping five-year terms,²⁰ the President may remove any member at any time.²¹ Aided by a permanent staff located in Washington, D.C.,²² panel members serve on a part-time basis to the extent dictated by case load and other responsibilities.

B. *Invoking the Panel's Procedures*

If voluntary arrangements, including mediation, fail to resolve an impasse, either party, the FMCS, or the Panel's Executive Director may request the Federal Service Impasse

factfinding and recommendations. It also recommended, however, that the Panel be empowered to take whatever action it deems necessary to bring a dispute to settlement. Study Committee, *Report and Recommendations Which Led to the Issuance of Executive Order 11491*, Recommendation F (August 1969).

¹⁷ Exec. Order No. 11491, § 5 WEEKLY COMP. PRES. DOC. 1334 (Oct. 29, 1969).

¹⁸ 5 U.S.C. § 7119(c)(1), (2) (1978).

¹⁹ 5 U.S.C. § 7119(c)(2) (1978). The Panel is an independent entity within the Federal Labor Relations Authority, an agency established pursuant to 5 U.S.C. § 7104 (1978) to administer the labor-management relations program in the federal service.

²⁰ 5 U.S.C. § 7119(c)(3) (1978). Of the original members appointed under the Statute, two were appointed for a term of one year, two for a term of three years, and the remaining members and the Chairman for a term of five years. Anyone appointed to fill a vacancy is appointed to the unexpired term of the member replaced. *Id.*

²¹ 5 U.S.C. § 7119(c)(3) (1978). While the Statute permits the President to remove any member of the Panel at will, it also establishes professional qualifications for members and specific terms of office. Any attempt to politicize the Panel will likely result in a serious diminution of the Panel's effectiveness in resolving negotiation impasses and redound to the detriment of the labor-management relations program.

²² 5 U.S.C. § 7119(c)(4) (1978). The Statute provides that the Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. *Id.*

Panel to consider the matter.²³ Alternatively, the parties may request the Panel's approval of an outside arbitration procedure which they have agreed to adopt.²⁴ In responding to such requests, the Panel initially conducts an investigation to determine the status of negotiations, including the extent of mediation assistance and the use of other voluntary arrangements.²⁵

The Panel may then decline to assert its jurisdiction if it finds that no impasse exists or for other good cause shown, such as the existence of a threshold question concerning a party's obligation to bargain over a proposal.²⁶ When declining jurisdiction, the Panel generally directs the parties to take appropriate action such as resuming negotiations, frequently with FMCS assistance, or invoking the procedures for resolving questions concerning the duty to bargain.²⁷ The Panel,

²³ 5 U.S.C. § 7119(b)(1) (1978) permits either party to request the Panel to consider an impasse. 5 C.F.R. § 2471.1(a) (1980) permits FMCS and the Executive Director of the Panel to request the Panel's consideration of an impasse.

²⁴ 5 U.S.C. § 7119(b)(2) (1978). The parties may not utilize an agreed upon outside binding arbitration procedure without the approval of the Panel. *Id.*

²⁵ Under 5 C.F.R. § 2471.3(a)(3), (b)(3) (1980), the parties must include the number, length, and dates of negotiation and mediation sessions held, including the nature and extent of all voluntary arrangements utilized when filing a written request for the Panel's consideration of an impasse or its approval of an agreed upon binding arbitration procedure. *Id.*

²⁶ 5 C.F.R. § 2471.6(a)(1) (1980). The Panel's rules and regulations define "impasse" as that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangement for settlement. 5 C.F.R. § 2470.2(e) (1980).

The Panel has also declined to assert jurisdiction in cases when it found that a question concerning the Union's representation status existed. *See, e.g.,* Minnesota Army National Guard, State of Minnesota, St. Paul, Minnesota and Chapter 21, Association of Civilian Technicians, Inc., 78 Federal Service Impasses Panel 59 (December 5, 1978), Panel Release No. 116 (February 2, 1979).

Finding some or all of the issues at impasse matters concerning the interpretation of present collective bargaining agreements, the Panel declined jurisdiction in Department of the Navy, Northern Division, U.S. Naval Base, Philadelphia, Pennsylvania and Local 1430, National Federation of Federal Employees, 81 Federal Service Impasses Panel 87 (August 10, 1981), Panel Release No. 196 (September 11, 1981); and Department of the Treasury, Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, 81 Federal Service Impasses Panel 47 (August 10, 1981), Panel Release No. 193 (August 21, 1981).

²⁷ 5 U.S.C. §§ 7105(a) and 7117(b), (c), (d) (1978). The Statute authorizes the Federal Labor Relations Authority, and not the Federal Service Impasse Panel, to resolve

however, may not decline to assert its jurisdiction in cases where the issues being discussed by the parties potentially fall outside the scope of bargaining under Title VII. Instead, the Panel may invoke its procedures hoping thereby to offer the parties an opportunity to discuss their problems and to reach a voluntary settlement.²⁸

C. *Requests for Approval of Agreed Upon Arbitration Procedures*

As Table 1 indicates, prior to 1978, the Panel received no requests for its approval of agreed upon outside binding arbitration procedures. Since 1978, the parties presented 14 such requests to the Panel. While inclined to approve such procedures, the Panel nevertheless rejects requests when it determines that the parties could utilize the procedure without authorization from the Panel, such as when the procedures involve advisory rather than binding arbitration or when the savings clause of the Statute renders such approval unnecessary.²⁹ The Panel withholds its approval of procedures contained in current agreements which could facilitate the resolution of future, rather than present, negotiation impasses. Responding to the needs of these parties, however, the Panel amended its rules and regulations by including provisions for the expeditious handling of requests for approval of binding arbitration procedures already contained in the parties' nego-

questions concerning a party's duty to bargain over a proposal. *Id.*

²⁸ In two recent cases, the Panel asserted its jurisdiction even though questions concerning negotiability existed concerning some of the issues at impasse. For a discussion of these cases, see *infra* notes 52-53 and accompanying text.

²⁹ 5 U.S.C. § 7135(a) (1978) provides:

- (a) Nothing contained in this chapter shall preclude . . .
 - (1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter.

Exec. Order No. 11491, § 5 WEEKLY COMP. PRES. DOC. 1334 (Oct. 29, 1969) contained a similar provision which provided for the continuation of lawful agreements entered into by an agency and a representative of its employees before the effective date of Exec. Order No. 10988 (January 17, 1962).

TABLE 1
CASES RECEIVED AND DISPOSITION OF CLOSED CASES

	CY 1970	CY 1971	CY 1972	CY 1973	CY 1974	CY 1975	CY 1976	CY 1977	CY 1978	FY* 1979	FY 1980	FY** 1981	Total
Cases Received	16	24	26	30	32	47	65	93	107	95	123	191	849
Type of Disposition													
Withdrawn	1	3	6	13	16	21	34	23	54	33	33	38	275
Jurisdiction Declined	7	16	9	2	4	7	6	13	21	18	35	37	175
Settled Prior to Panel Report & Recommendations	0	1	2	9	7	11	20	17	22	11	16	5	121
Settled After Panel Report & Recommendations	0	4	5	8	2	6	3	3	9	3	4	5	52
Decision & Order Issued Outside Arbitration	0	0	0	0	1	1	2	4	19	10	35	73	145
Recommended or Directed	0	0	0	0	0	0	0	0	0	0	3	6	9
Agreed Upon Arbitration Procedure Approved	0	0	0	0	0	0	0	0	2	0	2	4	8
Agreed Upon Arbitration Procedure Disapproved	0	0	0	0	0	0	0	0	1	1	4	0	6
Total Cases Closed	8	24	22	32	30	46	65	60	128	76	123	168	791

* January 1 to September 1979. CY = Calendar Year; FY = Fiscal Year.

** Preliminary Data

Sources: Annual Reports of the Federal Service Impasses Panel.

tiated agreement.³⁰

D. *Consideration of an Impasse by the Panel*

Table I also reveals that the years since the Panel's inception witnessed a steady, and lately, a dramatic increase in the number of requests for the Panel's consideration of impasses. In all cases where the Panel asserts its jurisdiction, as a first step, it either recommends procedures to the parties or it assists them in resolving their dispute.³¹ Only after completing this step does the Panel take whatever action it considers appropriate to resolve the dispute.³²

The Panel may recommend any procedure not prohibited by law which it believes will encourage the voluntary resolution of the impasse. Possible procedures include: factfinding with or without recommendations; outside binding arbitration according to whatever procedure the Panel deems appropriate; or a combination of mediation and arbitration (med-arb).

Assistance by the Panel may take many forms: mediation and conciliation, factfinding with or without recommendations, consultation, or other means of establishing a climate conducive to the voluntary resolution of the impasse.³³ The

³⁰ 5 C.F.R. § 2471.6(b) (1980).

³¹ 5 U.S.C. § 7119(c)(5)(A)(i) to (ii) (1978); 5 C.F.R. § 2471.6(a)(2) (1980).

³² 5 U.S.C. § 7119(c)(5)(B) (1978); 5 C.F.R. § 2471.11 (1980).

³³ Under the Order, confusion developed concerning the roles of FMCS and the Panel. Debate centered on whether or not the Order permitted the Panel to use mediation to resolve disputes or whether such efforts constituted an improper derogation of the role of FMCS. In 1978, FMCS and the Panel attempted to resolve this confusion and debate by agreeing that the Panel would refrain from mediation outside the context of the prehearing conference and the factfinding hearing, recognizing thereby that settlements often take place "at the courthouse steps."

According to some, confusion continues to exist under the statute. Some agency and union officials believe that the responsibilities of FMCS and the Panel overlap causing unnecessary duplication and delay. FMCS also complains of the alleged duplication of mediation efforts which it perceives to adversely affect its ability to secure voluntary settlements. According to FMCS, the parties essentially are given two chances to take a case to mediation which it believes causes some parties to bypass FMCS mediation in favor of settling their disputes with the Panel.

The Order perhaps produced justifiable confusion; the same, however, is not true of the statute. The statute requires the parties to utilize voluntary arrangements, including the services of FMCS or any other third-party mediation, before requesting the Panel to either consider the matter or approve an agreed upon binding arbitration procedure. The statute, therefore, assigns FMCS a critical, although not an ex-

latter could involve a hearing or a request for written submissions in lieu of a hearing where the Panel leaves open the determination of subsequent Panel action as a means of putting pressure on the parties. The Panel might even resolve one or more key issues when it determines that this would encourage the voluntary resolution of the remaining issues at impasse.³⁴

When the Panel determines that it will assist the parties by conducting a hearing, it may appoint one or more of its designees to conduct such a hearing.³⁵ The designated representative may conduct a prehearing conference, administer oaths, take the testimony or deposition of any person under oath, receive other evidence, and issue subpoenas.³⁶ The factfinder's report may contain recommendations, but only when authorized by the Panel. If the parties fail to accept the factfinder's recommendations or to otherwise resolve their dispute, they must submit to the Panel's Executive Director a statement setting forth reasons for not accepting the recommendations and for not resolving all issues.³⁷ If the parties reject the recommendations or the report contains no such recommendations, the Panel may take whatever action it considers appropriate to resolve the dispute.³⁸

clusive, role in providing pre-crises mediation. The Panel may not assert its jurisdiction prior to the utilization of such voluntary efforts. Even though the statute does not require the parties to exhaust voluntary efforts before seeking the assistance of the Panel, the Panel does not normally assert its jurisdiction until FMCS informs the Panel that it has exhausted its efforts to resolve the dispute. Thus, the exhaustion of voluntary efforts and the consequent creation of an impasse forms the jurisdictional boundary line between FMCS and the Panel. Once the Panel asserts jurisdiction, the Statute requires it to recommend procedures and/or assist the parties in the resolution of the impasse. Nothing in the legislative history of the statute indicates that Congress intended the Panel to exclude mediation and conciliation as forms of assistance it can properly render parties who reach the crisis stage in collective bargaining.

³⁴ Federal Trade Commission, Boston, Massachusetts and Local 3656, American Federation of Government Employees, AFL-CIO, 79 Federal Services Impasses Panel 65 and 80 Federal Services Impasses Panel 19, (May 29, 1980), Panel Release No. 152 (June 12, 1980).

³⁵ Procedures of the Federal Service Impasses Panel, 5 C.F.R. § 2471.7(a) (1980). The Panel could designate either its Executive Director, a staff associate, a member of the Panel, or other person to conduct a hearing.

³⁶ 5 C.F.R. §§ 2471.8(a)(1) (1980).

³⁷ 5 C.F.R. § 2471.8(c) (1980).

³⁸ 5 C.F.R. § 2471.11(a) (1980). The Panel's discretion, however, is not completely unfettered. Its actions may not be inconsistent with 5 U.S.C. ch. 71. 5 C.F.R. §

Prior to 1978, the Panel responded to nearly all requests for its consideration in a routine fashion, directing the parties to factfinding. Following a prehearing conference and a hearing, a staff associate issued a factfinder's report containing no recommendations. The Panel then considered the report and issued its recommendations. If these recommendations failed to produce a settlement, the Panel issued a decision and order resolving the matter. As Table 1 shows, in the early years of the Panel's operation, the parties reached voluntary settlement in most cases either before or after recommendations by the Panel. Few cases required a decision and order.

As the number of cases considered by the Panel, the number of issues at impasse, and the parties' apparent resistance to voluntary settlement increased, the Panel embarked on a different approach. When providing assistance or recommending procedures to the parties, the Panel in its discretion varies the formality or informality of the procedure on a case-by-case basis. In exercising its discretion, the Panel seeks to find a procedure appropriate to the facts of the case that will produce a timely and voluntary settlement of the dispute. The Panel encourages the parties themselves to develop procedures tailored to their needs and to make these procedures known to the Panel. Believing that the parties know best what procedures will most effectively help them in resolving their impasse, the Panel reviews procedural requests with a predilection in favor of their adoption. Disapproval will most likely result only when the Panel considers a procedure to be detrimental to the collective bargaining process.

If the dispute remains unresolved after the Panel recommends procedures and/or assists the parties, it may then take whatever action is necessary and not inconsistent with the Statute to resolve the dispute.³⁹ In preparation for taking final action, the Panel or its designee(s) may hold hearings; however, such hearings constitute just one procedural option. Alternatives include, but are not limited to, directing the parties to adopt a factfinder's recommendations where this is appro-

2471.11(a) provides the same express limitations on its power.

³⁹ 5 U.S.C. § 7119(c)(5)(B)(iii) (1978); 5 C.F.R. § 2471.11(a) (1980).

priate, ordering binding arbitration, conducted according to whatever procedure the Panel deems suitable, and rendering a binding decision.⁴⁰ The Panel will select that procedure which it deems most likely to produce a satisfactory settlement of the particular dispute. As in the earlier stages of the process, the Panel encourages the parties to request procedures tailored to their specific needs.

Notice of any final action by the Panel must be promptly served upon the parties, and the action is binding upon them during the term of their agreement unless they agree otherwise.⁴¹ Within 30 calendar days after receipt of such notice, each party must send evidence of compliance to the Executive Director of the Panel.⁴²

E. Appeal and Enforcement of the Panel's Final Action

The Statute contains no provision authorizing direct appeals from final decisions of the Panel. Decisions by the Federal Labor Relations Authority ("the Authority"), the Panel, and the courts currently hold that the unfair labor practice procedure is the exclusive means of obtaining review and enforcement of a final Panel decision. Finding no provision sanctioning review of a final Panel decision except through the ULP procedure set forth in the Statute, the Authority held that review may be sought by the party objecting to the final Panel order only after the filing of unfair labor practice charges by the other party based on noncompliance with the Panel's decision and order.⁴³ The Panel concluded that no ex-

⁴⁰ 5 C.F.R. § 2471.11(a) (1980).

⁴¹ 5 U.S.C. § 7119(c)(5)(C) (1978); 5 C.F.R. § 2471.11(d) (1980).

⁴² 5 C.F.R. 2471.11(e) (1980).

⁴³ The Authority clearly spelled this out in several decisions reached in late 1979 wherein it concluded that the clear intent and purpose of Congress was to establish the unfair labor practice procedure as the exclusive means of obtaining Authority review of final Panel decisions. Specifically in this regard, the Authority pointed to the portion of the legislative history of the Statute concerning final orders issued by the Panel under the Statute, 5 U.S.C. § 7119(c) (1978). The House report expressly states:

Notice of any final action of the Panel must be promptly served upon the parties, and the action is final and binding upon the parties during the term of the agreement, unless the parties agree otherwise. *Final action of the Panel under this section is not subject to appeal, and*

PLICIT provision of the Statute authorizes it to enforce its own decisions and orders through court action,⁴⁴ and the Ninth Circuit Court of Appeals held that a decision of the Panel is not a final order of the Authority reviewable pursuant to 5 U.S.C. § 7123 (1978).⁴⁵

F. *Appeal and Enforcement of Arbitration Awards Issued Pursuant to Agreed Upon Arbitration Procedures*

As noted above, the Statute permits the parties to use an agreed upon binding arbitration procedure if the Panel approves the procedure.⁴⁶ It appears that the unfair labor prac-

failure to comply with any final action ordered by the Panel constitutes an unfair labor practice by an agency under section 7116(a)(b) and (8) (1978) or a labor organization under section 7116(b)(6) and (8) (1978). (Emphasis added by the Authority)

H.R. REP. NO. 1403, 95th Cong., 2nd Sess. 54-55 (1978).

These provisions of section 7116 in the House bill adverted to in the report, and as enacted without modification in the Statute, state that it shall be an unfair labor practice for any agency or labor organization to "fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter; . . ." or "otherwise fail or refuse to comply with any provision of this chapter." State of New York, Division of Military and Naval Affairs and New York Council, Association of Civilian Technicians, Inc., 2 Fed. Lab. Rel. Auth. No. 20 (December 5, 1979) FLRA Report No. 22 (January 25, 1980); State of California National Guard, Sacramento, California and Locals R12-125, R12-132, R12-146 and R12-150, National Association of Government Employees, 2 Fed. Lab. Rel. Auth. No. 21 (December 5, 1979) FLRA Report No. 22 (25 January 1980).

⁴⁴ Puerto Rico Air National Guard, Santurce, Puerto Rico and Local 1665, National Federation of Federal Employees, 78 FSIP 62 (23 April 1979) Panel Release No. 107 (29 September 1978) and No. 110 (31 October 1978).

⁴⁵ Nevada National Guard v. United States, No. 79-7235 (9th Cir. December 14, 1979).

5 U.S.C. § 7123 (1978) provides:

(a) Any person aggrieved by any final order of the Authority other than an order under . . .

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination), may during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

⁴⁶ 5 U.S.C. § 7119(b)(2) (1978).

tice procedure constitutes the exclusive procedure available to a party aggrieved by the other party's failure or refusal to comply with the agreed upon procedure. In denying a request that it interpret and enforce a previously approved procedure after one party's withdrawal, the Panel noted that nothing in the Statute or in its rules and regulations gives it the authority to interpret or enforce such agreements.⁴⁷ The Panel also observed that when the parties request approval of binding arbitration procedures, it closes the case once it performs the limited function of approving or disapproving the procedure.

If the parties employ an outside binding arbitration procedure approved by the Panel, either party may file an exception to the arbitrator's award with the Authority.⁴⁸ If upon review the Authority finds that the award is deficient (1) because it is contrary to any law, rule or regulation; or (2) other grounds similar to those applied by Federal courts in private sector labor-management relations; it may take such action and make such recommendations concerning the award as it considers necessary and consistent with applicable laws, rules, or regulations.⁴⁹

If no exception to an arbitrator's award is filed during the 30-day period beginning on the date of the award, the award becomes final and binding. The Statute requires an agency to take the actions required by an arbitrator's award and any person aggrieved by the failure of a party to take such action may seek redress through the unfair labor practice procedures.⁵⁰

⁴⁷ Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, AFL-CIO, 78 Federal Service Impasses Panel 86 (18 December 1979) Panel Release No. 109 (30 October 1978).

⁴⁸ 5 U.S.C. § 7122 (1978) provides:

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

Section 7121(f) concerns adverse actions and removal or demotion for unacceptable performance.

⁴⁹ 5 U.S.C. § 7122(a) (1978).

⁵⁰ 5 U.S.C. § 7122(b) (1978).

G. *Significant Developments at the Panel*

As Table I shows, the Panel received 191 requests for its assistance in fiscal year 1981, a 55 percent increase over the number of requests received in the previous fiscal year and the largest percentage increase in any one year in the Panel's history. Unions filed 91 percent of all requests for assistance, a figure which is comparable with those of previous years.

Of the 168 cases closed in fiscal year 1981, the Panel issued decisions and orders in 73 of them. This represents 43 percent of the cases closed, a significant increase from previous years. Much of the increase may be attributed to the reduction in the number of cases directed to factfinding. In many cases, the Panel now directs the parties to submit their proposals, evidence, and arguments in writing, promising to take appropriate action upon receipt of these written submissions. While reflecting procedural preference in some cases, in others it reflects the growing budget constraints now besetting the Panel. In the latter cases especially, election of this procedure reduces the opportunity for voluntary settlement by removing the catalytic element frequently provided by the factfinder. It is regrettable that the Panel must function in this manner when the Statute seeks to promote collective bargaining, not third-party adjudication, as the means of determining conditions of employment for federal employees.⁵¹

Following a trend set in previous years, the Panel processed cases more quickly in fiscal year 1981 than in fiscal year 1980. The median time in which the Panel closed cases was 81 days as compared with 87 days in fiscal year 1980. The Panel also reduced the median time it took to issue a decision and order based on written submissions to 90 days in fiscal year 1981, 14 days less than in the previous fiscal year. It issued decisions and orders in cases involving a factfinding hearing in a median time of 168 days, up slightly from fiscal year 1980. Significant reductions in the amount of time it took for investigations to be initiated and completed, and for Panel determinations to be made also occurred. While the Panel

⁵¹ 5 U.S.C. § 7101(a) (1978).

strives to perform its function in a timely fashion, it attempts to do so in a manner consistent with the purposes of the Statute. As noted above, budget constraints dictate the selection of written submissions in many cases and these take less time to process. To the extent that the selection of this or any other procedure reflects budget concerns rather than a determination that the procedure best suits the particular impasse, the reduction of case processing time may be more a cause for concern than for rejoicing.

The Panel's treatment of two recent cases involving questions of negotiability represents another important development. It asserted jurisdiction in these cases even though it usually declines to assert such jurisdiction pending resolution of the negotiability questions. In one, the Panel directed the parties to submit the seven issues at impasse (all involving negotiability questions) to factfinding.⁵² Thereafter, the parties resolved three issues and the Panel resolved the other four on the basis of a decision and order. All issues were settled without invoking procedures to resolve the negotiability questions. In the other case, the Panel directed the parties to submit all issues in dispute to an outside arbitrator who would first mediate with respect to all issues at impasse, including those about which negotiability questions existed.⁵³ If mediation fails to settle the dispute, the Panel directs the arbitrator either to resolve any or all remaining issues or to postpone resolution pending a ruling by appropriate authority on any remaining negotiability questions. The parties shared the cost of this procedure. Resolution of all issues resulted.

In the recent dispute involving the Federal Aviation Administration and the Professional Air Traffic Controllers (PATCO), the Panel might have asserted its jurisdiction even

⁵² Department of the Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio, and Council 214, American Federation of Government Employees, AFL-CIO, 81 Federal Service Impasses Panel 53 (November 20, 1981) (Unreleased at the time of this writing).

⁵³ Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and General Committee, American Federation of Government Employees, AFL-CIO, 81 Federal Service Impasses Panel 119, 152 (September 19, 1981) (Unreleased at the time of this writing).

over those issues falling outside the scope of bargaining under Title VII, recommending procedures or assisting the parties in an attempt to resolve their dispute. The Panel, however, received no request for its consideration of this dispute even though it informed the parties that its door remained open to them. It declined to take a more active role because many issues being discussed fell outside the scope of bargaining. Whether the dispute could have been resolved by these means remains an open question.

III. IMPASSE PROCEDURES AND FEDERAL SECTOR COLLECTIVE BARGAINING

While the August 1981 strike by members of PATCO drew considerable attention, work stoppages do not characterize federal sector collective bargaining. Federal sector collective bargaining demonstrates a high degree of voluntarism and a nearly perfect record of peaceful resolution of negotiation impasses. Of approximately 800 sets of negotiations taking place in the federal service each year, less than 20 percent result in requests for the Panel's consideration or for its approval of binding arbitration procedures. The parties reach agreement in the others by themselves, often with the assistance of FMCS. Even when they fail to reach complete agreement, they usually resolve most issues and reach impasse on only a small number. As Table I shows, until fiscal year 1981 the parties also voluntarily resolved most of the issues they brought to the Panel, requiring final action by the Panel in only a small proportion of them. Even in fiscal year 1981 only a small proportion of the 800 sets of negotiations required final action by the Panel. In nearly all cases, the parties peacefully implemented the Panel's decision and order leaving very few problems of enforcement.

Conventional wisdom, however, anticipates that the existence of interest arbitration will produce a "chilling effect" on collective bargaining. While no significant chilling effect emerged in the first nine years of the Panel's existence, an increasing caseload and an increasing tendency for disputes to resist voluntary resolution engender concern over the future

prospect of a chilling effect. Initially, the parties' lack of familiarity with the Panel and their lack of sophistication in collective bargaining may explain their limited recourse to the Panel and their receptivity to its encouragement of voluntary settlements. Moreover, the limited scope of bargaining provided by the Statute, and the Order before it, mitigates the onerousness of the bargaining obligation for federal officials. Most economic issues fall outside the scope of bargaining. The statute, as the Order, further circumscribes the scope of negotiations by including a broad management rights clause. These limitations significantly reduce the stakes at the bargaining table, thereby enhancing the possibility of voluntary settlements. When the parties perceive the stakes to be high, as in cases involving the attire of civilian technicians of the national guard, collective bargaining produced fewer voluntary settlements and the resulting impasses more often necessitated final action by the Panel.⁵⁴ In such cases, problems of enforcement even arose.⁵⁵ No case, however, resulted in a work stoppage.

Forces now operating may produce an increasing number of impasses and make voluntary resolution more difficult. Chief among these is the Reagan administration's attempt to reduce

⁵⁴ As of December 1981, the Panel received requests to consider the uniform question in approximately 80 cases. It issued its first decision and order involving the uniform question in Massachusetts Air National Guard, Otis AFB, Falmouth, Massachusetts and Local 3004, American Federation of Government Employees AFL-CIO, 77 Federal Service Impasses Panel 18 (December 28, 1977) Panel Release No. 87 (January 6, 1978). It ordered the parties to adopt language in their agreement permitting civilian technicians, while performing their day-to-day technicians duties, the option of wearing either the military uniform or an agreed upon standard civilian attire without display of military rank, obtained at the expense of the technician. In numerous other cases involving this issue which required a decision and order, the Panel directed the parties to adopt similar language. Employer dissatisfaction gave rise to several requests for reconsideration which the Panel denied. In a few cases, the Panel responded to requests for clarification.

⁵⁵ See, e.g., Puerto Rico Air National Guard, Santurce, Puerto Rico and Local 1665, National Federation of Federal Employees, 78 Federal Service Impasses Panel 62 (April 23, 1979) Panel Release No. 107 (September 29, 1978) and Panel Release No. 110 (October 31, 1978).

North Carolina Air National Guard, 145th Tactical Airlift Group, Charlotte, North Carolina and Local 3001, American Federation of Government Employees, AFL-CIO, 81 Federal Service Impasses Panel 21 (May 26, 1981) Panel Release No. 190 (July 2, 1980).

the size of government. Undoubtedly this will generate increased bargaining over difficult issues such as reductions-in-force and the contracting-out of work. Another factor stems from the statutory provision of official time for employees representing an exclusive representative in collective negotiations when they otherwise would be in a duty status.⁵⁶ Agencies faced with increasing budget constraints may more readily invoke impasse procedures as a means of cutting the use of official time for bargaining. They may also increase their resistance to demands for official time for representation purposes.⁵⁷

Decisions by the Federal Labor Relations Authority defining the parameters of bargaining under the Statute increasingly require negotiations on subjects where management's resistance is high. For example, a decision requiring negotiation on stays of personnel actions generated numerous impasses and requests for the Panel's consideration of this issue.⁵⁸

The limited scope of bargaining under Title VII may also serve to make voluntary settlements more difficult to achieve. Many issues of concern to federal employees remain outside the scope of bargaining. After nearly two decades of bargaining over a restricted number of issues, unions seeking to demonstrate their worth to members and potential members in a system which bans union security arrangements, other than dues checkoff, may meet stiffer resistance as they demand further gains in these limited areas. To the extent that

⁵⁶ 5 U.S.C. § 7131(a) (1978) provides official time for any employee representing an exclusive representative in the negotiation of a collective bargaining agreement, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of such employees for whom official time is authorized may not exceed the number of individuals designated as representing the agency for such purposes.

⁵⁷ 5 U.S.C. § 7131(a) (1978) authorizes bargaining on official time for employee-union officials performing representation functions.

⁵⁸ American Federation of Government Employees, Local 1999, AFL-CIO and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 Fed. Lab. Rel. Auth. No. 16 (29 November 1979) FLRA Report No. 22 (25 January 1980). In this and other decisions relating to the procedures management will observe in exercising any rights reserved to it by the Statute, the Authority authorized negotiations on such procedures, unless such negotiations prevent the agency from acting at all.

unions and employees press for negotiations on matters currently outside the scope of bargaining, the possibility of peaceful resolution procedures becomes remote. As mentioned above, present impasse resolution procedures might have produced a peaceful settlement in the PATCO case, even though the major issues in dispute fell outside the scope of bargaining under Title VII. Certainly that likelihood would be greater if those issues fell within the scope of bargaining. Should union mergers occur to meet the growing concerns of federal employees and their representatives, demands, whether within the scope of bargaining or not, may be expressed in a more commanding voice than ever before. Peaceful resolution of resulting disputes more certainly will be forthcoming if a viable procedure exists which provides an opportunity for a dialogue on the issues and the resolution of the issues by objective persons who are knowledgeable in labor-management relations and in government operations.

While the number of negotiations resulting in impasse increases, along with the number of issues at impasse, the present impasse resolution procedures draw some criticism and some suggestions for improvement. Some suggest that the functions of FMCS and the Panel should be merged into one agency, thereby enhancing the effectiveness of mediation while providing arbitration by a permanent panel as a final means of resolving disputes. Undoubtedly there is some merit to this proposal. Others suggest a more limited step in this direction. For example, Frank Ferris, Director of Training and Negotiations for the National Treasury Employees Union, recommends giving FMCS authority to make recommendations for the settlement of impasses following a hearing. These recommendations would be binding unless either party could show cause why the Panel should review them.⁵⁹ Alternatively, he suggests that the Panel be replaced by ad hoc arbitration of all impasses with the Federal Labor Relations Authority being empowered to stay arbitration awards upon a showing of irreparable harm to one of the parties. A bill re-

⁵⁹ GOVT. EMPL. REL. REP. (BNA) 938:8 (November 16, 1981).

cently introduced in the House contemplates a lock-step procedure involving mediation, factfinding, and arbitration with the factfinders and arbitrators selected on an ad hoc basis.⁶⁰

No impasse resolution procedure functions without its critics. The evidence suggests, however, that the present procedures in the federal sector work effectively. Title VII gives the Panel broad authority to resolve impasses. Exercising this authority and its ingenuity to meet changes in the climate of bargaining and the needs of the parties in each case, the Panel shapes its response to requests for its assistance so as to encourage the timely and voluntary resolution of disputes. The unpredictability of the Panel's response prods the parties to reach agreement. The Panel has not exhausted the alternatives available to it under Title VII to resolve impasses and, budget permitting, it stands ready to perform its function of encouraging the timely and voluntary resolution of disputes whenever possible and, when this is not possible, to produce a settlement which conforms to the objectives of Title VII.

The present structure of the Panel provides a continuity which would be lacking under ad hoc arbitration arrangements. The latter may even lead to conflicting, and in some instances, illegal awards. Its cost would be unpredictable and may seriously impair collective bargaining in a federal system which does not provide union security.

The impasse resolution procedures provided by Title VII pave the way to the peaceful resolution of disputes over issues which fall within its scope of bargaining. The biggest threats to the continued successful operation of these procedures come from the limited scope of bargaining in the federal sector and the severe budget constraints currently being placed on the Federal Service Impasses Panel.

⁶⁰ H.R. 4435, 97th Cong., 1st Sess., 127 CONG. REC. H-6071 (daily ed. Sept. 9, 1981).

